

Transitional Justice Review

Volume 1 | Issue 3

Article 3

January 2015

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<http://dx.doi.org/10.5206/tjr.2015.1.3.3>

Recommended Citation

Lanegran, Kimberly (2015) "The Kenyan Truth, Justice and Reconciliation Commission: The Importance of Commissioners and Their Appointment Process," *Transitional Justice Review*: Vol. 1 : Iss. 3 , Article 3.
DOI: <http://dx.doi.org/10.5206/tjr.2015.1.3.3>
Available at: <https://ir.lib.uwo.ca/tjreview/vol1/iss3/3>

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**The Kenyan Truth, Justice and Reconciliation Commission:
The Importance of Commissioners
and Their Appointment Process¹**

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In May 2013, Kenya's Truth, Justice and Reconciliation Commission (TJRC) presented its long-delayed final report to President Uhuru Kenyatta. In four thick volumes, the commission synthesized and interpreted information gathered over the past four years regarding gross human rights violations and historical injustices in Kenya. The Report presents damning indictments of the governments led by each of Kenya's first three presidents, Jomo Kenyatta, the current President's father, Daniel arap Moi, and Mwai Kibaki, finding individuals and organizations in each administration responsible for assassinations, mass human rights violations against groups and political opponents, as well as wide scale corruption and economic crimes. Furthermore, it documents "state sanctioned systematic discrimination" against women and girls.² It recommends prosecution of 32 named individuals; an additional 33 people should be banned from holding public office; and government should begin investigations into allegations against a further 229 individuals and 12

¹ This paper is based on a paper presented at the International Studies Association Annual Convention in San Diego, CA in 2012. The author gratefully acknowledges the helpful comments of two anonymous reviewers and the financial support of Coe College's Edward S. Murray Memorial Research fund.

² Kenya Truth, Justice and Reconciliation Commission, "Report of the Truth, Justice and Reconciliation Commission," (3 May 2013) Volume 1, vii; available from www.tjrkenya.org. Hereafter: "Report."

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businesses.³ Many current officials are implicated. Notably, President Uhuru Kenyatta and his Deputy, William Ruto, currently facing prosecution by the International Criminal Court, are among those accused of planning and financing the violence that followed Kenya's disputed 2007 national elections.

Many people inside and outside the truth commission feared that a final report would never be written. A scandal surrounding the commission's Chairman, Ambassador Bethuel Kiplagat, tainted its birth, nearly destroyed it before work began, plagued it throughout its operations, and may still diminish the commission's impact and tarnish its legacy. Prominent human rights groups vigorously argued that Kiplagat himself was linked to human rights violations that the truth commission was expected to investigate. As a result, the truth commission lacked support and legitimacy, and was largely incapacitated for the entire first year of its mandate.⁴ During the months when the commission finally engaged in substantive hearings and data-collection, Kiplagat stepped aside to facilitate formal investigations into his suitability. Then, just as the writing phase was beginning in earnest, Kiplagat claimed he had no obligation to recuse himself and surprised the commission staff by returning to his office. Eventually, an uneasy accommodation was reached; Ambassador Kiplagat returned as Chairman, but he agreed to not participate in writing the final report and would not review sections of the report in which he had an alleged conflict of interest.⁵

The controversy had been so prominent that the commission was compelled to include in its Report a lengthy section on the "credibility and suitability of the chairperson."⁶ As a result much of the Kenyan media coverage of the Report's release rehashed the

³ Kenya Truth, Justice and Reconciliation Commission, "Report" Volume IV, Appendix One; available from www.tjrkenya.org.

⁴ Interview with ICTJ-Kenya spokesperson, Nairobi, Kenya June 23, 2011; Interview with Tecla Namachanja Wanjala Nairobi, Kenya June 22, 2011.

⁵ Kenya Truth, Justice and Reconciliation Commission, "Report" Volume 1, chapter 4, 139; available from www.tjrkenya.org.

⁶ Kenya Truth, Justice and Reconciliation Commission, "Report" Volume 1, chapter 4, 124-144; available from www.tjrkenya.org.

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scandal. Indeed, as many predicted, the Commission found sufficient evidence against Ambassador Kiplagat to include him in the list of those who should be investigated for prosecution. This drew attention away from victims of atrocities in Kenya whose stories were conveyed in the Report and gave fuel to those seeking to delegitimize the commission's conclusions and recommendations.

This cautionary tale highlights a hitherto under-examined feature of truth commission—the importance of commissioners and their appointment processes. Because there is so very little research on selection processes for commissions, the advice given to leaders establishing new commissions remains simplistic. For example, in 2011 after the government of Brazil passed legislation establishing its National Truth Commission, the International Center on Transitional Justice (ICTJ) advised President Dilma Rousseff “to select members of the commission on the basis of careful, transparent consultation with civil society, ensuring all commissioners are widely respected and regarded as politically independent, capable and impartial.”⁷ But no body of analysis explains how to design a transparent consultative process with civil society; there is no comparative evidence yet that demonstrates that impartial commissioners are actually best; and there is no consensus concerning what skills or experiences make a person a capable commissioner.

As a foray into this research agenda, this article analyzes the process through which Bethuel Kiplagat became the chairperson of Kenya's truth commission to provide lessons to people designing future truth commissions.⁸ I assess the state of the field concerning best practices for appointing truth commissioners and evaluate the degree to which Kenya's TJRC complied with them. Second, I test the popular perception that Bethuel Kiplagat was appointed by the

⁷ International Center for Transitional Justice, “Brazil: Six Critical Steps for Truth Commission Success,” (September 22, 2011); available from www.ictj.org.

⁸ Fieldwork in Kenya was conducted in June 2011; interviews were conducted with eight high-ranking members of the Kenyan TJRC and five leaders of human rights organizations that worked with or criticized the truth commission. Primary documents were provided by the truth commission and human rights organizations.

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Kenyan government to undermine the truth-seeking agenda. I conclude that a generally well-designed commissioner selection process was followed in Kenya's case, yet it failed to promote an appropriate slate of candidates for the truth commission. The evidence does not demonstrate that Kiplagat's nomination and appointment were part of a concerted government effort to sabotage the truth commission. Rather, the Kibaki government's role was more subtle; it had opportunity to ensure that individuals with strong human rights credentials became commissioners but lacked the desire to do so. My main theoretical conclusion is that technical issues such as selection processes are not as important as a broader challenge quite well known to observers of truth commissions: political will to support an active truth-seeking project.

What we “know” about truth commissioners

Little scholarship on commissioners—their selection processes, best practices, experiences or impact—has been conducted, and discussions about commissioners focus on only a few broad questions. Should members of a commission represent specific segments of society, or should they be neutral parties? What exactly is the best role for commissioners? Should they be active in the commission's daily work or serve more like a board of directors? Should a truth commission be led by citizens of the country or foreign nationals or a combination of both? Consensus is, however, coalescing around the position that a transparent consultative selection process is best. Yet, arguments rest on anecdotal evidence and theoretical assertions rather than systematic comparisons.

The lack of careful study of truth commissioners is lamentable given the emerging evidence of their impact on a commission's success or failure. In a rare comparative study based on interviews with former staff of truth commissions, Joanna Quinn and Mark Freeman conclude, “Perhaps the most important task for framers [of truth commissions] is the appointment of the commissioners. How many people will act as commissioners? Who

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will they be, and what will be the process for their selection?”⁹ In its major advisory document for post-conflict states considering establishing truth commissions, the Office of the United Nations High Commissioner for Human Rights notes, “Ultimately, no factor will more define the [truth] commission than the persons who serve as its members.”¹⁰ Priscilla Hayner, in her extensive overview of truth commissions notes, “As the public face of the commission, the members’ personal and political authority is critical in dealing with recalcitrant authorities and in persuading the public to trust and engage with the process.”¹¹ Poor leadership by commissioners and staff has indeed been blamed for poor investigations of crimes and loss of donor support in a number of cases, including Haiti and Sierra Leone.¹²

Overall, precious little is known about the “best practices” for selecting appropriate commissioners or what makes a “good” commissioner. Observers agree that it is vitally important to do this right, but give only the most general words of advice. For example, the ICTJ advises selecting commissioners who are neutral, enjoy the public’s confidence in their human rights record, represent diverse perspectives, have relevant professional experience and are able to work full-time.¹³ But the broader literature offers conflicting advice. Either pick impartial individuals (if impartiality is believed possible)

⁹ Joanna R. Quinn and Mark Freeman, “Lessons Learned: Practical Lessons Gleaned from Inside the Truth Commissions of Guatemala and South Africa,” *Human Rights Quarterly* 25 (2003): 1128.

¹⁰ Office of the United Nations High Commissioner for Human Rights, “Rule-of-Law Tools for Post-Conflict States: Truth Commissions” (2006), 13; available from www.ohchr.org.

¹¹ Priscilla B. Hayner, *Unspeakable Truths: Transitional Justice and the Challenge of Truth Commissions* 2nd edition (New York: Routledge, 2011), 212.

¹² Joanna Quinn, “Haiti’s Failed Truth Commission: Lessons in Transitional Justice,” *Journal of Human Rights* 8 (2009): 265-281; Beth Dougherty, “Searching for Answers: Sierra Leone’s Truth and Reconciliation Commission,” *African Studies Quarterly* 8:1 (2004): 39-56; Augustine S. J. Park, “Community-based Restorative Transitional Justice in Sierra Leone,” *Contemporary Justice Review* 13:1 (2010): 95-119.

¹³ International Center for Transitional Justice, “Truth Seeking: Elements of Creating an Effective Truth Commission” (2013), 18; available from www.ictj.org.

or pick a representative group of partial individuals who can neutralize each other's biases.¹⁴ A relatively weak panel of commissioners can work,¹⁵ but an active one would be needed to hold public hearings.¹⁶ A few foreigners on a commission might be beneficial,¹⁷ but there is no comprehensive scholarship examining whether they make a difference to a commission.

There is significant agreement in the literature, however, that it is best to use a consultative process when selecting the people to serve on a truth commission. Rather than just having a President unilaterally appoint commissions, as Brazil's President Rouseff was empowered to do, a number of writers suggest that the public should be broadly engaged in the selection process.¹⁸ The UNHCHR

¹⁴ Eric Wiebelhaus-Brahm, *Truth Commissions and Transitional Societies: The Impact on Human Rights and Democracy* (New York: Routledge, 2010), 157; M. C. W. Pinto, "Truth and Consequences or Truth and Reconciliation? Some Thoughts on the Potential of Official Truth Commissions," in *Man's Inhumanity to Man: Essays on International Law in Honour of Antonio Cassese* edited by Lal Chand Vohrah, Fausto Pocar, Yvonne Featherstone, Olivier Fourmy, Christine Graham, John Hocking and Nicholas Robson (The Hague: Kluwer Law International, 2003), 693-728; Audrey R. Chapman and Patrick Ball, "The Truth of Truth Commissions: Comparative Lessons from Haiti, South Africa, and Guatemala," *Human Rights Quarterly* 23 (2001): 17; Office of the United Nations High Commissioner for Human Rights, "Rule-of-Law Tools for Post-Conflict States: Truth Commissions" (2006), 13; available from www.ohchr.org.

¹⁵ Audrey R. Chapman and Patrick Ball, "The Truth of Truth Commissions: Comparative Lessons from Haiti, South Africa, and Guatemala," *Human Rights Quarterly* 23 (2001): 42.

¹⁶ Office of the United Nations High Commissioner for Human Rights, "Rule-of-Law Tools for Post-Conflict States: Truth Commissions" (2006), 14; available from www.ohchr.org.

¹⁷ M. C. W. Pinto, "Truth and Consequences or Truth and Reconciliation? Some Thoughts on the Potential of Official Truth Commissions," in *Man's Inhumanity to Man: Essays on International Law in Honour of Antonio Cassese* edited by Lal Chand Vohrah, Fausto Pocar, Yvonne Featherstone, Olivier Fourmy, Christine Graham, John Hocking and Nicholas Robson (The Hague: Kluwer Law International, 2003), 720; Joanna R. Quinn and Mark Freeman, "Lessons Learned: Practical Lessons Gleaned from Inside the Truth Commissions of Guatemala and South Africa," *Human Rights Quarterly* 25 (2003): 1128.

¹⁸ Priscilla B. Hayner, *Unspeakable Truths: Transitional Justice and the Challenge of Truth Commissions* 2nd edition (New York: Routledge, 2011), 212.

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advises, “Truth commissions will garner the greatest public and international support if their members are selected through a consultative process... [which] may include inviting nominations from the public and forming a representative selection panel (appointed by a variety of sectors or societal groupings) to vet the nominations and interview the finalists, recommending the final commissioners to the appointing authority.”¹⁹ However, in practice, while the unilateral presidential appointment process has resulted in some inappropriate panels of commissioners, some Presidents appointed an admirable group of commissioners. Furthermore, some inclusive processes have led to poor choices.

The Heads of State of Serbia, Uganda, Ghana, and Nigeria were empowered to appoint their countries’ truth commissioners with little input from civil society or other government bodies. At one extreme, Yugoslavia’s Vojislav Koštunica and Uganda’s Yoweri Museveni took the opportunity to appoint allies so as to enable government manipulation and suppression of the truth-seeking processes. Largely as a result, neither commission gained widespread legitimacy or fulfilled its mandate.²⁰ At the other extreme, even though Ghana’s John Kufour only consulted with the advisory Council of State and the selection process of Nigeria’s Olusegun Obasanjo remained a mystery to even the commissioners themselves, the individuals they appointed were all regarded as neutral and some were highly respected in their countries.²¹ Although these

¹⁹ Office of the United Nations High Commissioner for Human Rights, “Rule-of-Law Tools for Post-Conflict States: Truth Commissions” (2006), 13-14; available from www.ohchr.org.

²⁰ Jelena Subotić, *Hijacked Justice: Dealing with the Past in the Balkans* (Ithaca: Cornell University Press, 2009), 55; Joanna R. Quinn, “Constraints: The Un-Doing of the Ugandan Truth Commission,” *Human Rights Quarterly* 26 (2004): 423.

²¹ Ken Agyemang Attafuah, “An Overview of Ghana’s National Reconciliation Commission and its Relationship with the Courts,” *Truth Commissions and Courts: The Tension Between Criminal Justice and the Search for Truth* edited by William A. Schabas and Shane Darcy (The Hague: Kluwer Academic Publishers, 2004), 125-134; Mathew Kukah, “Peace Versus Justice? A View from Nigeria,” *Peace versus Justice? The Dilemma of Transitional Justice in Africa* edited by Chandra Sriram and Suren Pillay (Durban: University of KwaZulu-Natal Press, 2009), 171-186; Nneoma

commissions had considerable shortcomings, the quality of the commissioners themselves was not problematic. So a unilateral appointment process alone does not make the selection of appropriate commissioners impossible.

Similarly, allowing representatives from a cross-section of society to participate does not always inoculate a selection process against appointing a problematic panel of commissioners. As mandated by their respective Acts, selection panels were formed to appoint the commissioners in East Timor, Sierra Leone and Liberia. Specific political parties and NGOs and religious organizations had to be represented on the selection panels in East Timor and Sierra Leone; in Liberia, the representative from the Economic Community of West African States (ECOWAS) had to coordinate the selection of “[t]hree representatives from civil society organizations, [and t]wo representatives from political parties” to join the ECOWAS and UN representatives on a panel to nominate commissioners.²² In each case, the panels were directed to solicit nominations from the public, vet candidates and recommend a short list to the head of government for appointment. In East Timor, this process worked well appointing seven respected, yet not necessarily prominent, individuals with experience in human rights or religious institutions from across the political spectrum.²³ In Sierra Leone and Liberia, however, most of the appointees lacked appropriate experience and skills. Notably, both of these commissions lacked strong leadership, which hampered each body’s ability to deal effectively with difficulties working with staff, as in Sierra Leone’s case,²⁴ or tension within the commission, as in Liberia. Lansana Gberie noted that in Liberia, “The Chair, Jerome

V. Nwogu, *Shaping Truth, Reshaping Justice: Sectarian Politics and the Nigerian Truth Commission* (New York: Lexington Books, 2007).

²² National Transitional Legislative Assembly of Liberia, “Truth and Reconciliation Commission of Liberia Mandate,” (Monrovia Liberia, May 12 2005), section 8; available from www.trcofliberia.org/about/trc-mandate.

²³ Jen Laakso, “In Pursuit and Truth, Justice and Reconciliation: The Truth Commissions of East Timor and South Africa,” *Social Alternatives* 22:2 (2003): 52.

²⁴ International Crisis Group “Sierra Leone’s Truth and Reconciliation Commission: A Fresh Start” (20 December 2002), 6; available from www.icg.org.

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Verdier, [was] a young activist lawyer with little political and—even less—moral clout, both necessary for leadership of an institution of huge potential national and international importance.”²⁵ Clearly an inclusive selection process alone is insufficient for ensuring that skilled and effective commissioners are appointed.

First attempt at a truth commission for Kenya

The first serious discussions about Kenya implementing a truth commission came at the end of President Daniel arap Moi’s tenure in 2002. After Kenya’s independence, the Kenya African National Union (KANU) dominated under first Jomo Kenyatta and later Daniel arap Moi. This era saw the creation of an authoritarian government led by an imperial presidency notable for political repression, corruption and human rights abuses. With President Moi’s retirement and KANU’s defeat, the 2002 elections created an opportunity for the new government to address past human rights violations and establish new pro-human rights policies.

Hoping to signal that his administration marked the end to past atrocities, President Mwai Kibaki and his National Rainbow Coalition (NARC) government considered investigating past human rights crimes. In April 2003, the Minister of Justice and Constitutional Affairs empowered The Task Force on the Establishment of a Truth Justice and Reconciliation Commission “to find out if a truth commission was necessary for Kenya, and, if so, to make recommendations on the type of truth commission that ought to be established.”²⁶ It was chaired by Professor Makau Mutua, the energetic chairman of the Kenya Human Rights Commission.

After extensive consultations with the public, civil society and transitional justice experts, Mutua and his committee concluded that Kenyans did indeed need and want a truth commission to investigate the crimes of the Kenyatta-Moi era. It found evidence of unsolved

²⁵ Lansana Gberie, “Truth and Justice on Trial in Liberia,” *African Affairs* 107:428 (2008):456.

²⁶ Government of Kenya, “Report of the Task Force on the Establishment of a Truth, Justice and Reconciliation Commission,” (August 26, 2003), 11; available from www.marsgroupkenya.org.

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human rights violations and economic crimes that needed investigation²⁷ and concluded that Kenyans believed a truth commission would benefit their country.²⁸ In August 2003, it submitted a comprehensive report making the case for a truth commission and offering detailed recommendations for its structure, mandate, and powers. The Kenyan human rights community regarded this as exemplar work and endorsed the call for a truth commission.

However, political machinations led the government to abandon the truth-seeking project. It is clear that even at the Task Force's launch few Kenyan politicians embraced the endeavor wholeheartedly. All prominent members of NARC had at one point been KANU members; some had just abandoned Moi earlier than others. Task Force chairman Mutua knew at the time that a truth commission had few advocates in NARC.²⁹ It would be preferable to simply claim that their government would change the status quo without running the risk of being exposed as complicit in past violations.

Furthermore, the ruling coalition was extremely fragile as Mwai Kibaki's and Raila Odinga's camps soon were embroiled in serious disagreements about power-sharing and constitutional reforms. Godfrey Musila blames this fallout for destroying the momentum behind the truth commission.³⁰ As Kibaki and Odinga struggled for advantage over each other, each sought alliances with additional KANU politicians. A spokesperson of the Kenya Human Rights Commission explains that the agenda for the truth

²⁷ Government of Kenya, "Report of the Task Force on the Establishment of a Truth, Justice and Reconciliation Commission," (August 26, 2003), 21; available from www.marsgroupkenya.org.

²⁸ Government of Kenya, "Report of the Task Force on the Establishment of a Truth, Justice and Reconciliation Commission," (August 26, 2003), 9; available from www.marsgroupkenya.org.

²⁹ Makau Mutua, *Kenya's Quest for Democracy: Taming Leviathan* (Boulder: Lynne Rienner, 2008), 209.

³⁰ Godfrey Musila, "Options for Transitional Justice in Kenya: Autonomy and the Challenge of External Prescriptions," *The International Journal of Transitional Justice* 3 (2009): 449.

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commission was lost in 2004 when the government embraced and brought on board some of the KANU leaders expected to be investigated by the truth commission.³¹ Politicians dropped their lukewarm interest in a truth commission so as to not cause embarrassment for new allies.

Establishing Kenya's TJRC

The proposal for a truth commission lay neglected until after the violence that followed Kenya's elections of December 2007. International negotiators, led by Kofi Annan, guided Kenyan politicians and civil society in a National Dialogue and Reconciliation Process to end the post-election violence and foster political reform, reconciliation and justice for the country. During those negotiations, the idea of a truth commission was resuscitated, and the parties eventually agreed to establish the Truth, Justice and Reconciliation Commission.

The National Rainbow Coalition had collapsed over the 2005 Constitutional referendum ending the partnership between Kibaki and Odinga. Consequently, in the 2007 election Raila Odinga leading the new Orange Democratic Movement ran for the Presidency against Mwai Kibaki, leading his newly formed Party of National Unity (PNU).³² Early results released a few days after the election had ODM parliamentary candidates and Odinga ahead in Western and Rift valley and the PNU gaining with results from Central Kenya and Eastern. Yet, final results were delayed. On December 29, the head of the election commission speculated that this delay was caused by results "being cooked."³³ Then on December 30, he announced suddenly that Kibaki had won, and within an hour,

³¹ Kenya Human Rights Commission Spokesperson Interview, Nairobi, Kenya June 23, 2011.

³² Peter Kagwanja and Roger Southall, "Introduction: Kenya- A Democracy in Retreat?" *Journal of Contemporary African Studies* 27: 3 (2009): 259-277.

³³ Michael Chege, "Kenya: Back from the Brink," *Journal of Democracy* 19: 4 (2008): 137.

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Kibaki was sworn in to a second term. The ODM, however, had defeated PNU in the Parliamentary elections.³⁴

Almost immediately, riots began in areas loyal to Odinga who felt the presidency had been stolen from him. Soon, violence spread until Kenya was in its worst crisis since the coup attempt in 1982. By the time the mayhem ceased, more than 1000 people were killed and more than 300,000 had fled their homes.³⁵ Kenyans and the international community were shocked and horrified.

Amid domestic and international calls for peace, the main political parties entered into negotiations mediated by Kofi Annan and others from the African Union's Panel of Eminent Africans. On February 1, the parties announced that they agreed to tackle four major tasks at hand: achieving the immediate end to violence, implementing "measures to address the humanitarian crisis [principally facing displaced people], promote reconciliation, healing and restoration," overcoming the current political crisis concerning the election results, and devising long-term solutions to the problems that had ultimately given rise to the crisis.³⁶ A February 14 agreement put a truth commission squarely back on Kenya's reform agenda.³⁷

The truth commission proposal appears to have been brought back to life by members of Annan's negotiating team. One high ranking member of the commission believes that Kenyan politicians certainly would not have called for a truth-seeking project at that time; there continued to be no political will for it.³⁸ The impetuous probably came from elsewhere. Priscilla Hayner,

³⁴ Dorina Bekoe, "Kenya: Setting the Stage for Durable Peace?" *US Institute for Peace Briefing* (April 2008), 1; available from www.usip.org.

³⁵ International Crisis Group, "Africa Report No. 137 Kenya in Crisis" (21 February 2008), 1; available from www.icg.org.

³⁶ Kenya National Dialogue and Reconciliation, "On the Resolution of the Political Crisis Annotated Agenda and Timetable," (Nairobi, Kenya 1 February 2008); available from www.dialoguekenya.org.

³⁷ Kenya National Dialogue and Reconciliation, "Agenda Item Three: How to Solve the Political Crisis," (Nairobi, Kenya 14 February 2008); available from www.dialoguekenya.org.

³⁸ Truth, Justice and Reconciliation Commission Staff member B, Interview, Nairobi, Kenya June 21 2011.

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cofounder of the International Center for Transitional Justice, was a human rights advisor for Annan's negotiating team. Two sources, one inside Kenya's truth commission and another in a human rights organization, said that Hayner's advocacy for a Kenyan truth commission was significant in the process.

The parties agreed to form a truth commission and specified its general features. The commission should work for two years and issue a public report to the government regarding alleged violations of political and economic human rights that had occurred in Kenya from independence (December 12, 1963) through to the official end of the post-election violence (February 28, 2008). Commissioners from outside Kenya, selected by the African Union's Panel of Eminent African Personalities, would sit with a majority of domestic commissioners who would be "chosen through a consultative process." The body was to be independent and fair and could issue no blanket amnesty to perpetrators.³⁹

Kenya's truth commission had a number of classic features specified in its Act.⁴⁰ In order "to promote peace, justice, national unity, healing and reconciliation," it was mandated to establish an accurate record of past crimes against humanity and gross human rights violations committed by public officers as well as identify the causes of those crimes. It could recommend prosecution of some perpetrators and amnesty for others under limited conditions. It could also recommend means of restitution, including reparations, for victims. The commission should hold public hearings and needed to publish a final report. Yet the TJRC also ventured beyond the work of previous truth commissions. Responsible to investigate crimes committed over a 45 year period, it had the longest temporal jurisdiction of any commission established to date. More important however, Kenya's was the first truth commission mandated to

³⁹ Human Rights Watch, "Ballots to Bullets: Organized Political Violence and Kenya's Crisis of Governance," (March 2008), Annex 1 "Kenya National Dialogue and Reconciliation, Agreement establishing a Truth, Justice and Reconciliation Commission." Available at: www.hrw.org.

⁴⁰ Government of Kenya, "The Truth Justice and Reconciliation Act, 2008." Available at: www.tjrkenya.org.

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investigate economic crimes. The Act identifies “grand corruption and the exploitation of natural or public resources” efforts to illegally acquire public lands and “economic marginalization of communities” as examples of economic crimes but does not fully define the term.⁴¹

Selecting the TJRC Commissioners

The TJRC Act (Part II section 10) stipulated a process for appointing commissioners that complied with much of the advice in the literature. Three of the nine commissioners would be non-citizens selected by the Panel of Eminent African Personalities. Four of the commissioners should have “at least fifteen years’ experience in matters relating to human rights law;” five “shall have knowledge of and experience in forensic audit, investigations, psycho-sociology, anthropology and social relations, conflict management, religion or gender issues.” All had to be “impartial in the performance of the functions of the Commission... [and] generally enjoy the confidence of the people of Kenya.” As a whole, “the Commission shall, as much as practicable, be balanced, representative of Kenyan society, perceived to be impartial in its collectivity and of diverse professional and religious backgrounds.” Furthermore, each commissioner should be “of good character and integrity” and have “not in any way been involved, implicated, linked or associated with human rights violations of any kind or in any matter which is to be investigated under this Act.”⁴² This final requirement proved the most difficult to meet.

The Panel of Eminent African Personalities was free to devise its own selection process while the procedures for appointing the six Kenyans were laid out in detail. A nine person Selection Panel was to be formed out of representatives of specific religious, legal and professional organizations.⁴³ The Act stipulated that the

⁴¹ Government of Kenya, “The Truth Justice and Reconciliation Act, 2008.” Part II,6,n-p; available from www.tjrkenya.org.

⁴² Government of Kenya, “The Truth Justice and Reconciliation Act, 2008.” Part II,10. Available at: www.tjrkenya.org.

⁴³ The Act explicitly identified the organizations to be represented on the committee to select the commissioners (Government of Kenya, “The Truth Justice

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selection panel work within a very tight timeframe. Within two weeks of the commencement of the Act, the panel had to be formed and publically advertise for nominations for commissioners to be submitted during a three week period. The Selection Panel had only seven days to consider the nominees and submit to the National Assembly a ranked list of fifteen qualified individuals; the National Assembly would pass along six for the President to appoint. President Kibaki could appoint the chairperson from among the six. Overall, the Act required the National Assembly and the President to “have regard to gender equity and regional balance” when nominating and appointing commissioners.⁴⁴ Thus, an inclusive consultative selecting process was devised.

Indeed that process was closely followed. The Kenya National Commission on Human Rights held workshops for the organizations required to participate in the selection panel to familiarize them with the TJRC legislation and truth commissions in general.⁴⁵ Once the Act came into force in March 2009, a selection

and Reconciliation Act, 2008.” Part II,9). Two panelists had to be nominated by a joint forum comprising the Kenya Episcopal Conference, National Council of Churches of Kenya, Evangelical Alliance of Kenya, the Hindu Council of Kenya, the Seventh Day Adventist Church and the Supreme Council of Kenya Muslims. One person had to be nominated by the Law Society of Kenya. Another had to be nominated by Federation of Kenya Women Lawyers. The Central Organization of Trade Unions and the Kenya National Union of Teachers had to jointly nominate another panelist. Another had to come from the Association of Professional Societies of East Africa. Another would be nominated by the Kenya National Commission on Human Rights. The Kenya Private Sector Alliance and Federation of Kenya Employers would jointly nominate one panelist. The final one would be nominated by the Kenya Medical Association. The Chairperson of the selection committee was from the Association of Professional Societies in East Africa. His deputy was from the Kenya National Commission on Human Rights. The Secretary was from the Law Society of Kenya (Kenyan Broadcasting Corporation, “Minister names members of Truth, Justice and Reconciliation Commission” March 16, 2009).

⁴⁴ Government of Kenya, “The Truth Justice and Reconciliation Act, 2008 First Schedule: Procedure for Appointing Commissioners” 7. Available at: www.tjrkenya.org.

⁴⁵ ICTJ-Kenya spokesperson, Interview, Nairobi, Kenya June 23, 2011.

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committee was quickly formed with the proscribed membership. The week after nominations closed was very hectic. Of the nearly 250 people nominated, the Selection Panel interviewed 47.⁴⁶ It ranked fifteen candidates to send to the National Assembly. The Departmental Committee on Justice and Legal Affairs trimmed the list to nine: (in rank order) Bethuel Kiplagat, Thomas Letangule, Margaret Shava, Tom Ojienda, Timothy Njoya, Betty Murungi, Abubakar Zein, Techla Namachanja Wanjala and Ahmed Sheikh.⁴⁷ The House approved this list and passed it on to the President to select the final six. In late July 2009 the commissioners were announced. President Kibaki appointed Bethuel Kiplagat chairman of the TJRC; his deputy was Betty Murungi. The other Kenyan commissioners were Techla Namachanja Wanjala, Tom Ojienda, Margaret Shava, and Ahmed Sheikh. The Eminent Persons had selected Judge Gertrude Chawatama (Zambia), Ambassador Berhanu Dinka (Ethiopia) and Professor Ron Slye (USA).

Immediately, people expressed dissatisfaction about the panel of commissioners. The international figures were unknown to Kenyans. Some groups were unimpressed by a number of the Kenyan nominees and some felt it was inappropriate for Ahmed Sheikh, as a retired military officer, to serve. However, none of those complaints compared to the uproar against the appointment of Bethuel Kiplagat as chairman. A selection process that appeared designed to engender the greatest possible legitimacy to the panel of commissioners had instead created a debacle.

Scandal surrounding Chairman Kiplagat

Within a week of the announcement of Kiplagat's appointment, there were complaints in the press that he did not meet the selection criterion of not having been "involved, implicated, linked or

⁴⁶ Chairperson of the selection panel quoted in Sarah Wambui, "Experts say Kenya Truth Process on Track," *CapitalFM* (Feb 11, 2010); available from www.capitalfm.co.ke.

⁴⁷ Kenyan National Assembly, "Adoption of Report on Nomination of Commissioners to the Truth, Justice and Reconciliation Commission" (25 June 2009).

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associated with human rights violations of any kind or in any matter which is to be investigated” by the TJRC.⁴⁸ Four arguments were made against his appointment. First, some felt that simply as a former high-ranking member of President Moi’s government, he could not lead a truth-seeking effort into violations committed by that government.⁴⁹ The Muslim Human Rights Forum, for example, called for his removal even before his swearing in because he was “an insider in the administration of former President Moi at critical moments of gross human rights violations which will be subjects of inquiry by the TJRC.”⁵⁰

Furthermore, Kiplagat was already personally associated with two prominent crimes which the truth commission would have to investigate if it hoped to be seen as credible. One was the infamous “Wagalla Massacre” of 1984 during which government forces rounded up thousands of ethnic Somalis, detained them without food or water at an airstrip for days and slaughtered hundreds. It was arguably the single worst human rights atrocity of independent Kenya. Yet very little is publicly known about who ordered the action, and victims and survivors await justice. There is evidence that Bethuel Kiplagat was present at a meeting of the local District Security Committee a few days before the security operation in Wagalla began.⁵¹ Therefore, some allege that he has information about the planning of the massacre. At the very least, many expected that the commission would have to interview Kiplagat.

⁴⁸ Government of Kenya, “The Truth Justice and Reconciliation Act, 2008.” Section 10. Available at: www.tjrkenya.org.

⁴⁹ Bethuel Kiplagat joined the Kenyan government in 1978 and held various foreign affairs posts including Kenya’s Ambassador to France, High Commissioner to Great Britain, and Permanent Secretary to the Ministry of Foreign Affairs. He left government in 1991 and served on a number of boards including that of the Nairobi Stock Exchange. He became active in regional peace negotiations serving as Kenya’s Special Envoy to Somalia 2003-2005. He served on the board of the International Crisis Group for two years starting in 2004.

⁵⁰ Catholic Information Service for Africa, “Religion; Muslim Human Rights Forum Rejects Kiplagat” (July 28, 2009); available from www.lexisnexis.com.

⁵¹ S. Abdi Sheikh, *Blood on the Runway: The Wagalla Massacre of 1984* (Nairobi, Kenya: Northern Publishing House, 2007), 20.

The other case concerned the murder of the Minister of Foreign Affairs Robert Ouko, in 1990 when Kiplagat was the Permanent Secretary in Ouko's Ministry. This assassination is arguably Kenya's greatest unsolved murder despite being the subject of one trial and three separate government inquiries. Some evidence suggests that individuals in Moi's inner circle were responsible for the murder.⁵² Indeed, Kiplagat had served as a witness for each of the governmental inquiries into Ouko's death. Most problematic for Kiplagat's appointment to the truth commission, the 2005 report of the Parliamentary Select Committee's investigation in Ouko's death noted that an earlier investigation had concluded that Kiplagat was untruthful in his statements. Therefore, the parliamentary committee in 2005 had recommended further investigation into what Kiplagat knew about Ouko's assassination.⁵³ Here was another case in which he would be a necessary witness in a case Kenyans expected the TJRC to investigate. Critics argued that the chairman testifying before his own commission would render the TJRC an illegitimate farce.

The final argument against Kiplagat's suitability as a commissioner points out that he had already been identified as personally responsible for violating the economic rights of Kenyan citizens. The 2004 report by the government's Commission of Inquiry into the Illegal/Irregular Allocation of Public Land (the Ndung'u Report) concluded that Ambassador Kiplagat had illegally or irregularly acquired three specific parcels of land.⁵⁴ Specifically

⁵² Smith Hempstone, *Rogue Ambassador: An African Memoir* (Sewanee, TN: University of the South Press, 1997), chapter 5.

⁵³ Kenya Human Rights Commission, "The Position of the KHRC on the Credibility of Bethuel Kiplagat, the Chair of Kenya's Truth, Justice and Reconciliation Commission" (17 February 2010). On file with author.

⁵⁴ Kenya Human Rights Commission, "The Position of the KHRC on the Credibility of Bethuel Kiplagat, the Chair of Kenya's Truth, Justice and Reconciliation Commission" (17 February 2010). On file with author; International Center for Transitional Justice, "Kenya: Truth Commission Chair Should Step Down" (22 February 2010); available from www.ictj.org; Truth, Justice and Reconciliation Commission of Kenya, "A Petition from the Commissioners of the Truth Justice and Reconciliation Commission of Kenya Pursuant to Section 17

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mandated to investigate economic crimes and make recommendations concerning the implementation of previous reports like the Ndung'u Report, the TJRC would have been expected to directly investigate the actions of its own chairperson.

Impact of the scandal

One insight the Kenyan case offers to theoretical conceptions of truth commissions is the central importance of earning legitimacy in the eyes of civil society organizations and maintaining their support. Many Kenyan human rights organizations became distrustful of the TJRC and demanded that Kiplagat step down. Some groups concluded that the entire TJRC was irretrievably tainted and refused to work with it and/or called for it to disband. Consequently, public opinion turned against the commission, the TJRC could not count on the assistance of civil society organizations to facilitate its fundraising efforts, investigations, and public awareness campaigns, and the Kenyan government and foreign donors declined to adequately fund the commission. Eventually, the commission itself turned to desperate steps and asked the government to investigate whether Kiplagat should be removed from office. Ultimately, the entire first year of the truth commission's two-year mandate was effectively wasted due to the accusations against Kiplagat.

To many human rights groups, Kiplagat's appointment as chairman looked like the government's attempt to sabotage the truth-seeking agenda and shield those in power from close scrutiny.⁵⁵ In February 2010, calls for Kiplagat's resignation reached a fever pitch. The Kenya Human Rights Commission concluded that Kiplagat "falls short of the qualifications of the chair" as stipulated by the Act

and Section 10 of the Truth, Justice and Reconciliation Act No.6 of 2008, as Amended" (April 2010); available from www.tjrkenya.org.

⁵⁵Interview with International Centre for Policy and Conflict spokesperson, Nairobi, Kenya June 22, 2011; Interview with ICTJ-Kenya spokesperson, Nairobi, Kenya June 23, 2011.

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and demanded his resignation.⁵⁶ Eight Kenyan human rights groups issued a similar joint press statement.⁵⁷ Ten former members of other truth commissions, including South Africa's Archbishop Desmond Tutu and four other past chairmen, also called on Kiplagat to leave the TJRC citing the allegations of his inability to be impartial in important areas of the commission's work.⁵⁸

Going further, some organizations and individuals argued that the truth commission was too discredited and flawed to be allowed to go forward. Kenyans Against Impunity, in September 2009 called for the commission's disbanding citing Chairman Kiplagat as one of the reasons.⁵⁹ Makau Mutua repeatedly called for the TJRC to fold. Even in June 2011, when the TJRC had started hearings and Kiplagat had stepped down, a few prominent human rights activists privately said that they personally felt the TJRC's continued lack of credibility meant it would best for it to be disbanded and reconstituted.⁶⁰

However, Kenya's civil society is not homogenous, and organizations had fluid and varying relationships with the TJRC. Individual groups made their own calculations about whether and how to work with the truth commissions, and those decisions also shifted over time.⁶¹ FIDA-Kenya, The Catholic Peace and Justice Committee and the Kenya National Human Rights Commission are among the groups that offered legal assistance and civic education,

⁵⁶ Kenya Human Rights Commission, "The Position of the KHRC on the Credibility of Bethuel Kiplagat, the Chair of Kenya's Truth, Justice and Reconciliation Commission" (17 February 2010). On file with author.

⁵⁷ International Centre for Policy and Conflict, "Press statement: Impunity-Free TJRC Boggled by Chair's Credibility Crisis," (7 February 2010). On file with author.

⁵⁸ Capital FM radio (Kenya), "Archbishop Tutu, Others Urge Head of Kenyan Truth Panel to Quit," February 25 2010; available from www.lexisnexis.com.

⁵⁹ Kenyans Against Impunity, "Why We Reject the TJRC as Formed and Composed," September 3, 2009. On file with author.

⁶⁰ Interviews with representative of Kenya National Commission on Human Rights Nairobi, Kenya June 23, 2011 and representative of International Center for Policy and Conflict Nairobi, Kenya June 22, 2011.

⁶¹ Interview with ICTJ-Kenya spokesperson, Nairobi, Kenya June 23, 2011.

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and identified and prepared witnesses to testify at hearings.⁶² The International Committee of Jurists and the International Centre on Peace and Conflict, systematically observed the hearings, but did not actively assist the commission.

As accusations against Chairman Kiplagat increased, he grew less popular with Kenyans. A March 2010 survey showed that the public was divided about whether Kiplagat should stay on as chairman. A full 30% of those surveyed didn't know who the chair of the TJRC was. Of those who could identify him, 49% wanted Kiplagat to remain chair while 41% wanted him to resign.⁶³

The scandal surrounding the chairman also exacerbated the severe funding problems hampering the TJRC. Originally, the commission proposed a total budget of \$27 million (approx. 2.4 billion Kenya shillings) for its two years of work.⁶⁴ Yet for fiscal year 2010-11 the Kenyan government agreed to give the commission 16% of the funds requested to be distributed in three installments.⁶⁵ The resulting cash flow problems required supplemental government funding and increased the necessity of additional financial support from donors. International donors, however, largely refused to fund the commission. In its 2011 progress report, the truth commission concluded that "the controversy that surrounded the suitability of its Chairperson" was one of the main reasons why donors were unwilling to support it.⁶⁶

⁶² Interviews with ICTJ-Kenya spokesperson, Nairobi, Kenya June 23, 2011 and Kenya Truth, Justice and Reconciliation Commission staff member A, Nairobi, Kenya June 20, 2011.

⁶³ Samwel Kumba, "Kiplagat Row Splits Locals," *The Nation (Nairobi)* March 30, 2010; available from www.lexisnexis.com.

⁶⁴ Truth, Justice and Reconciliation Commission Kenya, "Progress Report to the National Assembly," (24 June 2011), 39; available from www.tjrkenya.org.

⁶⁵ Truth, Justice and Reconciliation Commission Kenya, "Progress Report to the National Assembly," (24 June 2011), 39; available from www.tjrkenya.org.

⁶⁶ Truth, Justice and Reconciliation Commission Kenya, "Progress Report to the National Assembly," (24 June 2011), 38; available from www.tjrkenya.org.

Efforts to resolve the crisis

In April 2010, the commissioners asked Chief Justice Evan Gicheru to begin the process to determine whether Kiplagat should be removed from the commission. That same month Betty Murungi, the commissioner with the most credibility among the Kenyan human rights community, resigned her seat. Yet the government did not move expeditiously to address Kiplagat's case. In October, Commissioner Ron Slye, the most visible international commissioner, announced his intention to resign citing his belief that the commission could not complete its mandate under Kiplagat's leadership. However, before Slye's resignation came into effect, the government announced that it would investigate Kiplagat's appointment, so Slye remained. On November 2, Kiplagat stepped aside from day to day work of the commission, and the Chief Justice appointed the Tribunal. The TJRC soon received an extension to its two-year mandate and, for the next 16 months, worked without Ambassador Kiplagat in office.

Yet, the Tribunal's work was halted when Kiplagat instigated a legal case against it; at issue was its mandate. According to the TJRC's founding legislation, a Tribunal could remove a commissioner on the grounds of "misbehavior or misconduct" while serving. Initially, the commission asked Chief Justice Gicheru to investigate whether Ambassador Kiplagat was in violation of the Act when he submitted to the selection committee, and then maintained while chairman, that he was not "involved, implicated, linked or associated with human rights violations" likely to come before the commission.⁶⁷ However, the Chief Justice mandated a Tribunal in November 2010 to investigate "the allegations that the said Chairman's past conduct erodes and compromises his legitimacy and credibility to chair the Commission."⁶⁸ Ambassador Kiplagat immediately filed an application first before the Tribunal and then the

⁶⁷ Kenya Truth, Justice and Reconciliation Commission, "Report" Volume I chapter 4, 128; available from www.tjrkenya.org.

⁶⁸ Kenya Truth, Justice and Reconciliation Commission, "Report" Volume I chapter 4, 130; available from www.tjrkenya.org.

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High Court challenging investigations into his conduct prior to becoming Chairman.

The High Court halted the work of the Tribunal but not the countdown on its 6 month mandate while the court considered Kiplagat's case. Then, when the Tribunal's mandate expired before the High Court case heard statements, Kiplagat withdrew his case against the Tribunal. As a result, the High Court never had opportunity to rule on whether the Chief Justice's Tribunal had been properly constituted, and the Tribunal itself never pronounced whether Kiplagat was guilty of misbehavior and misconduct or had conflicts of interest with his commission.

There was also a concurrent case that muddled the legal issues at least as perceived by some in the public. A lobby group Kenyans Against Impunity began separate proceedings against the commission asserting that the selection process laid out by the Act had not been followed and that Kiplagat's oath of office had not been properly administered.⁶⁹ In November 2011, a three judge panel that found that the composition and work of the selection panel and the administration of the oaths of office had been *procedurally* correct according to law. Furthermore, it determined that the court was not the appropriate venue for the applicants to seek the removal of Kiplagat on the *merit* of his appointment and noted that the Chief Justice's Tribunal had been established. Therefore this case against the TJRC and Kiplagat was dismissed. However, many in the press and Kiplagat himself interpreted this as clearing him of all allegations.⁷⁰

In the meantime, Ambassador Kiplagat had been called to testify to the truth commission as a person "named adversely" by many witnesses who gave statements regarding the Wagalla Massacre. His description of the TJRC as "his commission" at the time, led reporters and civil society groups to questioned his precise official

⁶⁹ Kenya High Court, "Republic v Truth Justice & Reconciliation Commission & another Ex-parte Augustine Njeru Kathangu & 9 others" [Kenya High Court Misc App. No 470 of 2009]; available from www.kenyalaw.org.

⁷⁰ Kenya Truth, Justice and Reconciliation Commission, "Report" Volume I chapter 4, 150; available from www.tjrkenya.org.

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role. The commission also made plans to call Kiplagat to testify as “an adversely mentioned person with respect to irregular land acquisition and the assassination of the Honourable Dr. Robert Ouko.”⁷¹

Then in January 2012 Kiplagat unexpectedly returned to the Commission offices, demanded access to the office of the Acting Chairperson and told the press that he was “back with a bang.”⁷² He argued that because there were no active legal cases against him he should return to work. With critics once again up in arms against Kiplagat, questioning the TJRC’s neutrality and demonstrating outside their offices, the remaining commissioners initially refused to work with Kiplagat and sought recourse in the courts. They asked the Kenyan High Court to forbid Ambassador Kiplagat to return to work until a Tribunal had addressed the allegations concerning his suitability. Furthermore, they asked the High Court to order the current Chief Justice Willy Mutunga to create such a Tribunal in accordance with the TJRC Act.⁷³ However, Justice Mohamed Warsame ruled against the commission, and Chief Justice Mutunga refused to (re)constitute a tribunal.⁷⁴

⁷¹ Kenya Truth, Justice and Reconciliation Commission, “Report” Volume I chapter 4, 138; available from www.tjrkenya.org.

⁷² Wahome Thuku, “Kiplagat back at Truth Commission,” *The Standard* (January 17 2012).

⁷³ Kenya High Court, “Truth, Justice and Reconciliation Commission v the Chief Justice of the Republic of Kenya & Bethuel Kiplagat” Judicial Case No 7 of 2012. (February 24, 2012); available from www.kenyalaw.org.

⁷⁴ Justice Warsame’s ruling and the Commission’s argument are confusing. See Kenya High Court, “Truth, Justice and Reconciliation Commission v the Chief Justice of the Republic of Kenya & Bethuel Kiplagat” Judicial Case No 7 of 2012. (February 24, 2012); available from www.kenyalaw.org. The Commission’s lawyers appear to have asked that the Court order the Chief Justice to establish a new tribunal with a mandate similar to the first one i.e. to investigate “the allegations that the past conduct of [Mr. Kiplagat] erodes and compromises his legitimacy and credibility to chair” (p. 4) rather than the narrower language of the TJRC’s original petition to the Chief Justice to investigate whether Kiplagat’s maintenance of his sworn affidavit, that he was not linked to any violations to come before the commission, was misconduct. Justice Warsame determined that the Chief Justice would have no power to appoint a tribunal to investigate a commissioner’s past

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The impasse was finally broken via negotiations made possible by the Ministry of Justice and Kenya's Commission on Administrative Justice. In April 2012, Chairman Kiplagat and the other commissioners agreed that he would return the TJRC but would not be involved writing the final report. He could review the final report, but an Aide Memoire specified that he would not be able to review parts of the Report "concerning massacres, political assassinations, and land" and would have the same rights and opportunities as adversely mentioned persons, to make his case before the commission.⁷⁵ The Commission pledged upon the release of its Report that it "can categorically state the final drafts of the chapters of the Report dealing with land, political assassinations, and massacres were drafted without any input or influence by Kiplagat" and that he was given the opportunity to "write a response or dissenting opinion."⁷⁶

Kiplagat chose to dissent in the press. Only, a few days after handing the report to President Uhuru Kenyatta, the Chairman stood before reporters criticizing some of the commission's methods, findings, and powers. He said, "If you read on Ouko, Wagalla and land, findings and recommendations do not tally... the commission will have a difficult time proving their case in court in case some of the accused take legal action... You cannot just hand over a report and say prosecute."⁷⁷ Thus, the scandal surrounding the Commission's leadership continues to undermine Kenya's truth-seeking efforts.

behavior and therefore would not order the Chief Justice to do so (pp.14-16). Furthermore, Justice Warsame apparently referring to the *Kathangu v TJRC* High Court ruling, determined that "the controversy once settled by the authoritative decision of the High Court should not be re-opened unless there are extraordinary reasons for doing so" and implied that this was "frivolous and vexatious" litigation created by "meddlesome interlopers" (pp.16-17).

⁷⁵ Kenya Truth, Justice and Reconciliation Commission, "Report" Volume I chapter 4, Appendix 10, 212; available from www.tjrkenya.org.

⁷⁶ Kenya Truth, Justice and Reconciliation Commission, "Report" Volume I chapter 4, 141; available from www.tjrkenya.org.

⁷⁷ Capital FM (Nairobi) "Kiplagat Doubts TJRC Report Will Pass the Test of Time" May 23 2013; available from www.allafrica.com.

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How did this happen?

Some Kenyans believe that Bethuel Kiplagat was appointed chairperson of the TJRC to allow the tradition of impunity to continue to pollute their country.⁷⁸ However, the evidence undermines this hypothesis in three ways. First, it was civil society organizations themselves who led the selection process that recommended that the President name Kiplagat to the commission. Second, while chairman, Kiplagat did not support the government's most prominent attempt to co-opt the truth commission. Finally, the government's pattern of granting funds and extensions to the TJRC and participating in its legal wrangling is more indicative of uncertainty over what to do with the commission rather than a concerted plan to support Kiplagat's chairmanship.

Consequently, I hypothesize that the most plausible explanation for this debacle is that President Kibaki, lukewarm to the entire truth-seeking project at best, took advantage of the opportunity handed to him, not created by him, to appoint a controversial chairman. Although there is no evidence that Kiplagat agreed to try to protect government officials from the commission's investigations, it likely comforted Kibaki to have a chairperson who was not a political outsider. Furthermore, it served the government's interest, and is in keeping with Kibaki's decision-making style, to launch a flawed commission and let it flounder, hopefully to eventually capsize.

The opportunity to undermine the truth commission was provided by the inattentive work of the Selection Committee. Bethuel Kiplagat's candidacy was initiated and supported by peace sector civil society groups. The National Council of Churches of Kenya initially nominated him; Kiplagat had previously served as the Council's Deputy General Secretary.⁷⁹ After leaving Moi's government, Kiplagat had been active in regional peace-keeping initiatives and had denounced Kenya's post-election violence. At the

⁷⁸ Interview with International Centre for Policy and Conflict spokesperson, Nairobi, Kenya June 22, 2011.

⁷⁹ Sarah Wambui, "Kenyan Lawyer Faults Tutu on TJRC," *Capital FM* (February 26, 2010); available from www.capitalfm.co.ke.

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time of nomination, he was Executive Director of Africa Peace Forum.

Struggling to evaluate the approximately 250 nominees in the allowed week, the Selection Committee failed to adequately vet the finalists. One member Florence Simbi-Jaoko explained that the selection committee “relied on an affidavit in which we asked those we interviewed to swear that their past was clean.”⁸⁰ So even though it was mandated that a commissioner not be implicated or associated with any human rights violation, the selection committee conducted no independent background checks of nominees. Another member Isaiah Kubai explained later that he felt it had not been the responsibility of the Panel to investigate candidates’ past because that should have been Parliament’s obligation.⁸¹ Their colleague, Evans Monari said that none of the criticisms of Kiplagat found in the press after his appointment were brought to the attention of the Selection Panel.⁸² In the end, the Selection Panel placed Kiplagat among the fifteen recommended nominees and ranked him near the top.

President Kibaki had even less interest in setting up a vigorous truth commission in 2008 than he had been in 2003 when he shelved the recommendations of the Mutua Task Force. This new truth commission had a mandate to move beyond the Kenyatta-Moi years to investigate more recent human rights and economic crimes of the new administration as well as the post-election violence committed by supporters of both presidential candidates. Therefore, few politicians would enthusiastically welcome an active independent truth commission. So when President Kibaki was given an opportunity to select a chairperson who was a seasoned politician with professional and personal ties to government, it is not surprising that he appointed the former ambassador to the chair while two highly respected prominent clergymen with no previous ties to the

⁸⁰ Samwel Kumba, “Kenya: Truth Team Selection Panel on the Spot,” *Daily Nation* (February 26, 2010); available from www.allafrica.com.

⁸¹ Samwel Kumba, “Kenya: Truth Team Selection Panel on the Spot,” *Daily Nation* (February 26, 2010); available from www.allafrica.com.

⁸² Sarah Wambui, “Kenyan Lawyer Faults Tutu on TJRC,” *Capital FM* (February 26, 2010); available from www.capitalfm.co.ke.

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government would be left off the commission entirely. One does not have to go so far as to believe in collusion between Kiplagat and the Kibaki government to see why Kiplagat might have been preferred.

Another reason to discount the grand conspiracy thesis is that under Kiplagat's leadership, the TJRC commissioners publicly resisted the government over a proposed change to their mandate, which overlapped with other judicial efforts to prosecute those most responsible for human rights crimes during Kenya's post-election violence. Agreements made during Kenya's National Dialogue also obliged the government to prosecute people responsible for post-election crimes. The Commission of Inquiry into Post-election Violence (the Waki Commission) in October 2008 announced that it had evidence that a number of prominent individuals, whom it did not name, should be prosecuted for alleged crimes surrounding the election. In July 2009, when the Kenyan government declined to establish appropriate trials for those individuals, their names were handed over to the Prosecutor of the International Criminal Court (ICC).⁸³

Although Kenyan authorities had failed to establish a local tribunal to try people implicated in the post-election violence, many politicians regard an ICC case as an even more dangerous alternative. Therefore, in a last ditch effort, Kibaki announced that his cabinet was considering expanding the mandate the TJRC to include investigations of those suspected of post-election violence.⁸⁴ This infuriated critics who accused the government of working to maintain the impunity of prominent suspects. Dr. Makau Mutua, for

⁸³ In December 2010 ICC prosecutor announced charges against six suspects in this case—William Samoei Ruto, Henry Kiprono Kosgey, Joshua Arap Sang (then allied with Odinga's Orange Democratic Movement and Francis Kirimi Muthaura, Uhuru Muigai Kenyatta, and Mohamed Hussein Ali (allied with Kibaki's Party of National Unity)—for their alleged responsibility in the commission of crimes against humanity. All six first appeared before the court in April 2011, but the cases against all but Ruto, Arap Sang and Kenyatta were dropped. In 2013, Uhuru Kenyatta was elected President of Kenya and William Ruto became Vice-President. All three cases continue before the ICC.

⁸⁴ BBC Monitoring Africa, "Kenyan Cabinet Opts for Truth Body to Deal with Post-Poll Crimes," (July 30, 2009); available from www.lexisnexis.com.

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example, wrote a blistering editorial directly accusing the government of appointing Kiplagat chair of the commission so that it could move the post-election violence suspects over to its jurisdiction and then shield them from harsh scrutiny and punishment.⁸⁵

Mr. Kiplagat's actions, however, do not suggest that he had agreed to collude with the government over the truth commission's agenda and work. Rather he joined the other commissioners in vehemently rejecting the proposal. They wrote to the Minister for Justice and Constitutional Affairs to express their firm objection, and Ambassador Kiplagat told the press that they were all prepared to resign if the proposal went forward.⁸⁶ It did not.

Furthermore, the pattern of government funding of the TJRC does not suggest the existence of a concerted strategy to back a purposely co-opted commission under Kiplagat. If the Kenyan government had plotted to establish a weak truth commission led by a "plant," then it seems logical that it would have been more generous with its funds when Kiplagat led the commission as opposed to after he had stepped down. Instead the opposite happened. As noted above, the TJRC repeatedly approached the government for supplemental allocations both before and shortly after Ambassador Kiplagat stepped aside in November 2010. The precarious funding situation was finally alleviated in April 2011 when the government gave the commission an award more than twice the size of its initial pledge to the commission under Kiplagat's leadership.⁸⁷

There is no obvious straightforward interpretation of this funding pattern. Many factors extraneous to the Kenyan government's desires for the truth commission surely impact its budgetary decisions. However, it does not clearly support the conspiracy argument that Kenyan authorities planned to use Kiplagat

⁸⁵ The Nation (Nairobi), "Nothing Could Be More Insulting to Kenyans," (August 2, 2009); available from www.lexisnexis.com.

⁸⁶ BBC Monitoring Africa, "Chair of Kenya's Truth Commission Defies Cabinet over Mandate," (August 20, 2009); available from www.lexisnexis.com.

⁸⁷ Truth, Justice and Reconciliation Commission Kenya, "Progress Report to the National Assembly," (24 June 2011), 40. Available: www.tjrkenya.org.

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to undermine the truth seeking agenda. There are some who say that the reason the government was not more generous to the Kiplagat-led commission was that it feared that Kiplagat would soon have to leave the post.⁸⁸ According to this interpretation, the government didn't want to get the commission on solid ground only to then lose its friendly chairman. But if a conspiracy was afoot, the government would have felt more confident working with a commission led by Kiplagat as opposed to an uncertain future of a commission with another chairperson. It seems more logical to try to get a friendly truth commission up and running and over with quickly so as to complete that obligation as painlessly as possible. Furthermore, the conspiracy interpretation cannot explain why the government was comparatively more generous funding the commission once Namachanja Wanjala became Acting Chairperson.

This funding pattern suggests that the government was willing to allow the commission process to make its own mistakes, support it as little as possible and respond to opportunities and demands as they evolved. It is clear that the government did not want a vigorous truth commission so they funded it poorly and hoped to watch it fade away or self-destruct under Kiplagat. However, when the commission did not implode and managed to demonstrate that Kenyans wanted the process to continue, the Kenyan government released more funds.

Conclusion

The near death experience of Kenya's Truth, Justice and Reconciliation Commission brought on by the scandal surround the appointment of Bethuel Kiplagat as its chairperson offers three main lessons to inform those establishing future truth commissions. First, as important as it is to establish a selection process designed to achieve the greatest possible legitimacy the truth-seeking body, excellent plans are only as good as the work of people who implement them. Second, in a context of limited government

⁸⁸ Interview with ICTJ-Kenya spokesperson, Nairobi, Kenya June 23, 2011.

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support for a truth commission, any error in the selection process that might jeopardize a truth commission may be utilized by its opponents in government. It does not take government subterfuge to undermine a truth commission; insufficient will to protect it from errors can be adequate. Finally, the practical lesson that comes from this case is to allocate sufficient time for the selection process to unfold and provide transparency so that candidate commissioners can be carefully vetted. Do not assume that a process implemented by civil society will ensure that appropriate commissioners are selected. In this case, once civil society organizations hurriedly put forward a panel of possible commissioners that included a candidate likely to keep the commission from gaining credibility, the Kibaki government declined to protect the truth commission from this error.

On a positive note, the Kenyan TJRC did eventually issue a commendable report. The commission staffed worked in extremely difficult and uncertain circumstances, at times without pay, to press for a solution to the problem of their chairman, creatively seek allies and demonstrate what the truth commission could achieve for Kenyans. Their work was facilitated and buoyed up by a second factor—Kenyans' willingness to participate in the truth-seeking project. Even when the truth commission's fate was far from certain, over 30,000 individuals submitted statements concerning crimes in Kenya's past, which is the largest number of statements received to date by any truth commission.⁸⁹ Furthermore, in 2011 when the TJRC began its public hearing phase, people turned out in large numbers to testify and listen. There was heart-rending testimony given at well-attended early hearings in North Eastern Province and in Mt. Elgon, which demonstrated popular desire for truth-seeking and justice. Nongovernmental organizations responded to the evidence of popular interest and began to give more support to the truth commission, and the TJRC persevered.

⁸⁹ Truth, Justice and Reconciliation Commission Kenya, "Progress Report to the National Assembly," (24 June 2011), iii; available from www.tjrckeny.org.